# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 73-2021

ALGIE L. OUTLAW AND MEAKA S. OUTLAW, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The opinoin of the Court of Claims (Pet. App. A-1 to A-20) is reported at 494 F. 2d 1376.

## JURISDICTION

The judgment of the Court of Claims was entered on April 17, 1974. The petition for a writ of certiorari was filed on July 13, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## QUESTION PRESENTED

Whether a venture known as the Cherry Hill Trust was correctly held to be an association taxable as a corporation so that its net operating losses could not be deducted by its investors.

## STATUTE INVOLVED

Section 7701(a)(3) of the Internal Revenue Code of 1954 is set forth at Pet. 2.

## STATEMENT

On January 15, 1965, petitioner,[1] along with 40 other persons, organized a venture called the Cherry Hill Trust No. 1 ("the Trust") for the ownership and management of certain farm lands in Georgia for investment. A bank was selected as a trustee and was specifically empowered to engage in agriculture on those lands. A self-perpetuating operating committee was established to give instructions to the trustee. At the peak of its operations, the Trust employed 18 to 20 full-time employees, and had 400 acres under active cultivation, raising various row crops for sale to east coast markets. In addition, the Trust utilized additional land in experimental cultivation of bamboo for possible use in making paper (Pet. App. A-2, A-3, A-11).

The term of the Trust was ten years and it could not be terminated by an investor at will (Pet. App. A-12). Management was centralized solely in the operating committee, which occupied itself with the everyday activities of the Trust, as well as with major policy decisions (Pet. App. A-13). Liability of the investors was limited to the investors' proportionate investment in the assets of the Trust (Pet. App. A-13 to A-14). An investor's share in the Trust assets was represented by a certificate of "beneficial interest," which was freely transferable, upon notice to the trustee. If the entire interest were transferred, no consent was required. However, if less than an entire interest were transferred, the consent of the trustee was required, but the trustee could refuse consent only if it believed the assignment would substantially increase the burden of administering the Trust (Pet. App. A-16).

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[1] Meaka S. Outlaw is a party only because she signed a joint income tax return with her husband, Algie L. Outlaw, for the years at issue. The term "petitioner" refers only to Algie L. Outlaw.

During the years in suit, 1965, 1966 and 1967, the Trust sustained net operating losses, which, by the terms of the trust instrument, were allowed to flow directly to petitioner and the other 40 investors. The investors deducted these losses on their federal income tax returns. On audit, the Commissioner disallowed these loss deductions on the ground that the Cherry Hill Trust was an association taxable as a corporation and was, accordingly, the only proper entity to take account of the losses for tax purposes. The Court of Claims unanimously upheld the Commissioner's determination and dismissed petitioner's suit (Pet. App. A-1 to A-20).

## ARGUMENT

In holding that the Cherry Hill Trust was an association taxable as a corporation, the Court of Claims adhered to the principles first announced by this Court in *Morrissey* v. *Commissioner*, 296 U.S. 344. There, the Court held that a trust formed for the development of a tract of land through the construction of a commercial golf club and the sale of lots had sufficient corporate attributes to require it to be taxed in the same manner as a corporation under the predecessor provision of Section 7701(a)(3) of the 1954 Code, which defines the term "corporation" as including "associations, joint-stock companies, and insurance companies." Under the rule announced in *Morrissey,* an association should be taxed as a corporation rather than a partnership or general trust if it has all or most of the following characteristics: (1) associates, (2) an objective to carry on business and divide the gains therefrom, (3) continuity of life, (4) centralization of management, (5) liability for corporate debts limited to corporate property, and (6) free transferability of interests. These characteristics have since been included in and explained by Treasury Regulations, Sections 301.-7701-2 and 301.7701-4.

Here, the Court of Claims found that each of the factors set forth in *Morrissey* and the Treasury Regulations was present in the Cherry Hill Trust, thereby making it taxable as a corporation. Petitioner does not challenge the factual analysis of the Court of Claims nor does he explicitly urge that *Morrissey* was incorrectly decided. However, petitioner argues (Pet. 7) that in defining the term "corporation," Congress must have intended to impose a levy only upon the adoption of "corporate forms and procedures". But *Morrissey* specifically stated (296 U.S. at 358):

> While the use of corporate forms may furnish persuasive evidence of the existence of an association, the absence of particular forms, or of the usual terminology of corporations, cannot be regarded as decisive.

Contrary to petitioner's further argument (Pet. 11), nothing in Sections 671 through 678 of the Code, the so-called grantor trust provisions, requires a different result. The Cherry Hill Trust was only nominally a trust and thus could not come within the purview of the grantor trust provisions. Those Code provisions do not govern businesses normally carried on through organizations classified as corporations or partnerships. See Treasury Regulations, Section 301.7701-4.

Finally, petitioner urges (Pet. 6) that the decision below is contrary to *Lewis & Co.* v. *Commissioner*, 301 U.S. 385. While it is true that this Court reached a different result in *Lewis & Co.* than it did in *Morrissey*, the two cases are distinguishable on their facts. The trust involved in *Lewis & Co.* was held to lack associates, centralized management, limited liability, and free transferability of interests. Unlike the trust in the present case,

the trust in *Lewis & Co.* therefore did not sufficiently resemble a corporation to be taxed as one.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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